No. 12405

IN THE UNITED STATES

Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

ROTHSCHILD-INTERNATIONAL STEVEDORING COMPANY, a corporation,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLEE

W. E. DU PUIS,
Proctor for Appellee

816 Northern Life Tower
Seattle 1, Washington

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PAUL P. O'BRIEN,

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STATEMENT OF THE CASE

On or about the 13th day of May, 1946, at about the hour of 9:30 p.m., Libelant Alfred L. Dillon was injured while in the course of his employment in the tween decks of

the No. 1 hold on the S.S. "Goucher Victory" which was loading on the north side of pier 38 in Seattle, Washington.

When the accident causing injuries to the Libelant occurred, he was in the act of guiding a strong-back into the slot on the port coaming of the deck.

The strong-back suddenly gave way and fell, pinning the Libelant's right hand.

Libelant was employed by Rothschild-International Stevedoring Co., a corporation, who were stevedoring the vessel for the government under a standard contract which is marked as Respondents' exhibit A-2 (Aps. 205-250).

Libelant went to work on the night shift about 6:30 p.m. This shift was under the general supervision of Jacob Petri, Rothschild's foreman.

The "Goucher Victory" was equipped with electric winches (Aps. 137). It was the duty and the job of the Ship's chief electrician and his assistant to maintain the winches, to make the necessary repairs and adjustments (Aps. 142). The evidence showed and the court found that on or about the 13th day of May, 1946, at about the hour of 9:30 p.m., the Libelant Alfred Dillon, while in the course of his work, was standing in the tween decks of the No. 1 hold and was in the act of guiding a strong-back into the slot. The hatch tender gave the signal to the winch driver, Mr. Rigney, to "come back" with it; that means to lower it.

The brake didn't hold and it fell. Quoting the testimony of the winch driver, as follows:

"Q. Will you state the course of the movement of the strong-back from the time it left the poopdeck until it was brought down to the tween deck hold?

A. Yes. They had to hook it up with the spreaders, had to lift it, lower it down to the lower tween decks where I was given the signal to come down with it. Then I was stopped, then they gave me another signal to come back, and then the brake didn't hold and bam, down she went." (Aps. 93.)

. . . . .

"Q. What happened? You say she dropped down?

A. Yes.

Q. What happened?

A. The brake didn't hold. Sometimes your points don't catch and you jump them points and it releases itself automatically. Don't do it all the time, though." (Aps. 94.)

The longshoremen had experienced difficulty with these particular winches on several prior occasions on that evening and they had made complaints. Someone came and looked at the winches and did something to them on both occasions. The winch driver thinks it was the deck engineer.

"Q. Had you had any difficulty with the winches prior to that time?

A. Yes, sir.

Q. Just state what difficulty you had.

A. Well, the brakes didn't hold on two occasions.

Q. What happened when they didn't hold?

A. You come back and it seemed like she jumped the points and bam, she'll go right back.

Q. Did you make any complaint?

A. Yes, sir.

Q. Before this accident?

A. Yes, sir, twice." (Aps. 94 and 95.)

The evidence showed that the stevedores made complaints about the fact that the winches and the brake were not operating properly and that on both occasions someone from the ship whom the winch driver thought was the deck engineer came and did some work on the winches. From the testimony it is conclusive that complaints were made by the winch driver on at least two occasions on the evening prior to the injury of Mr. Dillon (Aps. 95 and 97). It is also in the evidence that as a result of these complaints, the winches were examined or checked by someone representing the Ship (Aps. 95 and 98).

The Stevedores do not maintain or repair the winches. The inference from the evidence is that they have no right to tamper with this equipment (Aps. 96).

The winch driver testified as follows in part:

"Q. You say you noticed something occurring at 7:30?

A. Yes, sir.

Q. What was that?

A. The same thing that happened when I was lowering the beam.

Q. What was it happened at 7:30?

A. Slipping of the brake." (Aps. 97 and 98.)

. . . . .

"Q. Was any thing done at 7:30 with reference to any repairs conducted on them?

A. Yes. A man came around and tinkered around with them winches." (Aps. 98.)

. . . . .

"Q. When was the next time there was anything wrong with this?

A. About 20 minutes to nine, or somewhere in there.

. . . . .

Q. What happened then?

A. The same thing.

Q. What did you do then?

A. We stopped again." (Aps. 99.)

. . . . .

"Q. Was anything done about it?

A. Yes.

Q. What was done?

A. The man came up and looked at it again. That's all." (Aps. 100.)

The evidence indicated that on the previous trip some 30 days prior to this accident, Mr. Claud Sellman, one of the Stevedores, had noticed that the winch was not functioning properly and he had told the electrician on duty to get it fixed. He stated he would get it fixed the next day. That was on the prior trip. (Aps. 107.) However, this witness testified that he noticed on the night of this accident that this defect had not been attended to. His testimony on this point is as follows:

"A. This night, as I say the reason this dropped—that is the question I am answering, I believe—I consider this a reason and I asked them to get this winch fixed so when it commenced to hit this night, the first time I had the winches, I told Rigney, "You want to watch that port winch because she slips sometimes. You have got to be prepared to stop a few feet before you really intend to because sometimes she will drop several feet before she takes ahold when you are either stopping or starting. When you come to a stop if you run through those notches slowly just about the time before you stop, it will drop several feet like that."

I told Paul that night, "This winch is in the same condition it was before," so when this happened, I figured what must have happened because you can't come back that fast with power on those electric winches. They won't take off that fast." (Aps. 108 and 109.)

Mr. Sellman further testified:

"Q. There wasn't anything wrong with the winches up until Mr. Dillon's accident, was there?

A. Yes.

Q. What was it?

A. The same thing. When you are going to land a load, sometimes it will slip two or three feet before it stops." (Aps. 111.)

"Q. (By Mr. Franklin on cross-examination of Mr. Sellman.) I am asking you how many times the winches slipped after they were stopped on the evening of Mr. Dillon's injury before his accident occurred?

A. After they were stopped? I didn't say anything about them slipping after they were stopped.

Q. What did you say was wrong with them?

A. When you are coming to a stop sometimes they would drop before the brake caught." (Aps. 112.)

The evidence therefore shows that the actual defect was not that the brake slipped after it was stopped, but on the other hand, when coming to a stop. There would be a slipping *before the brake caught* (italics ours). This particular situation had not occurred prior to Mr. Dillon's injury on the night of May 13th, 1946, and the Stevedores had therefore no knowledge of this particular defect. Mr. Dillon's injury resulted from the load falling when the winch driver was "coming back" or releasing and lowering away after they had been stopped. That particular defect had not ap-

peared on any prior occasion (Aps. 112). The Stevedores therefore did not have notice of that situation prior to the accident.

The evidence shows that the chief electrician, James A. Steele, never tightened the brakes (Aps. 147). The brake mechanism is a very complicated affair, as is plain from the testimony of the chief electrician, James A. Steele:

> "Q. Would you please describe the mechanism known as the automatic brake? As was present on the winches on number one hatch on the Goucher Victory?
>
> A. Well, it was an external contracting brake, consisting of two bands—they might be referred to as shoes—there was a one-inch pin in the bottom and the tops were drawn together by a large spring and the central portion had a shaft that connected to a large solenoid. The spring operated the brake and the solenoid released it, so the brake was held on by spring pressure when the power was disconnected." (Aps. 153.)

The evidence indicates that there are two brake bands on each winch and that they are affixed at the bottom of the drum on the winch and the solenoid at the top (Aps. 153 and 154). The latter is an electric coil that drives the brakes, opens them and releases them. There is a mechanism for adjusting these brakes which mechanism is situated at each point; adjustment could also be made to the linkage of the solenoid (Aps. 153 and 154). The linkage consists of a pin. There are several pieces to it and it is a rather complicated

mechanism as the testimony of the Chief Electrician James A. Steele discloses:

> "Q. Well, will you please describe what the main linkage is? What does it look like?
>
> A. Well, it consists of a pin—now, let me think. There are several pieces to it. I couldn't describe it in detail to you. There are too many pieces involved.
>
> Q. Well, do the best you can, then.
>
> A. However, it operates on the top or open side of the band to draw the two bands together, and it is a pulling action exerted by the spring. The spring setting against the ear on one band and pulling the ear of the other band up to it." (Aps. 155 and 156.)

The chief electrician never had tested the braking power of the *brakes* of the No. 1 hatch at any time (Aps. 156).

The foot brake did not amount to much, as is disclosed by the electrician's testimony:

> "Q. Now do you recall whether or not the foot brake was in working order on the number one hatch?
>
> A. Yes, it was in working order. I will say that the foot brakes, though, were very mediocre——
>
> Q. Generally, not much good?
>
> A. Well, they would not stop. They might slow it up a little, but they would not stop it. They were designed that way on purpose, they tell me. What the purpose is, I don't know but at any rate they were designed so that they wouldn't hold much, and they don't.

Q. Well, it is a matter of common notoriety that foot brakes on Victory ships aren't much good?

A. They don't hold very good, no." (Aps. 157.)

The problem of maintaining and tightening the automatic brake required skill and considerable work. It would require the services of two men for about an hour and one-half to do a good job (Aps. 158 and 159).

The testimony of Paul Rigney, the winch driver, and Claud Sellman, the hatch tender, conclusively shows that aside from a very casual tinkering the equipment received no attention after the complaints had been made by the Stevedores.

It is also obvious that due to the very involved mechanical nature of the mechanism, the Stevedores had no means or ability to maintain or repair it, and the evidence discloses they did not have the right to do so (Aps. 96 and 98). The duty and the knowledge required was with the chief electrician and his assistant, who are representatives of the Ship (Aps. 141).

EVIDENCE OF COMPLAINTS MADE BY STEVEDORES ABOUT DEFECTIVE EQUIPMENT

Paul Rigney, Rothschild's winch driver, testified that he complained on two separate occasions, the first time being about 7:30 in the evening (Aps. 98).

The second occasion he made complaint was at approximately twenty minutes to 9 (Aps. 99). As a result of these complaints he stated a man came around and tinkered with the winches (Aps. 98). As a result of the second complaint, a man came up and looked over the winches again (Aps. 100).

The Ship's officers or crew members at no time ever discussed the condition of the winches or the brake to Jacob Petri, who was the foreman for Rothschild-International Stevedoring Co. In fact, no one had advised Mr. Petri of any defective equipment, and he was Rothschild's alter ego. He was their representative direct. There is no evidence in the record that he compromised with negligence by acquiescence, by indifference or by neglect in any degree because the evidence is undisputed that he had no knowledge whatsoever of any dangerous condition.

Mr. Petri testified as the direct representative of the Stevedore that if he had known there was defective equipment, he would not have allowed the men to work (Aps. 197).

The winch driver and the hatch tender made complaints and made reports. The Ship sent men in answer to their complaints and the Stevedores thereafter worked on the reliance that the proper precautions had been taken by those who were responsible therefor.

TESTIMONY OF THE GOVERNMENT WITNESSES

The testimony of the Chief Mate Bauer and Chief Electrician Steele is negative for the most part. Mr. Bauer testified in part as follows:

"Q. Were repairs affected on any part of those winches at any time on May 18th, 1946?

A. Not as far as I know. Of course, the electricians could have worked on them, but there was nothing said to me about it.

Q. Would you have known if they were working on the winches?

A. Yes, I most likely would, if there had been any big repairs on it. Of course, they tested all the winches during the voyage, but I don't remember them doing anything to them." (Aps. 175, 176.)

. . . . .

"Q. There is a nut there that you tighten up to tighten the brakes?

A. Yes.

Q. Do you know whether anyone ever tightened that nut while you were aboard the vessel?

A. No.

. . . . .

Q. Did you at any time operate the winch yourself, that is, the winch on No. 1 hatch?

A. No; not on No. 1." (Aps. 180 and 181.)

Mr. Steele was off of the ship on the evening of the accident as is disclosed by the testimony of the government witness Frank Palmer:

> "Interrogatory No. 11: State what work was being carried on upon the vessel on Monday evening, May 13th, 1946, and by whom.
>
> A. Unloading cargo by stevedores.
>
> Interrogatory No. 12: Where was Mr. Steele that evening?
>
> A. He was off of the ship and I do not know where he was at." (Aps. 138.)

The evidence of Night Mate Ness does not indicate that he had any occasion to examine the winches. He merely stated as far as he could see they were operating all right. His testimony is that he did not hear any complaints. He is vague as to who gave him the information as to Dillon's injury. He supposed it was the Stevedore foreman. He was also vague as to other matters as disclosed in the following testimony:

> "Q. At the time you received that information, what, if anything, was said as to whether the accident was caused by any defect in No. 1 winches?
>
> A. No, I don't think there was any." (Aps. 123.)

The testimony of government witnesses Bauer, Steele and Palmer was all negative and was by deposition.

THE DISTRICT COURT'S FINDINGS OF FACT AS BEARING UPON THE ACCIDENT

V

That on or about the 13th day of May, 1946, at about the hour of 9:30 p.m., the Libelant, Alfred L. Dillon, while in the course of his employment, was standing in the tween decks of the No. 1 hold and was in the act of guiding a strong-back into the slot provided as a resting place for said strong-back on the port coaming of said deck, and that while using due care and caution on Libelant's part, the said strong-back suddenly and without warning fell and caught Libelant's right hand injuring it as hereinafter more fully set out.

VI

"That the said injuries to Libelant were proximately caused by the unseaworthiness of the said ship, and by the passive negligence of the Rothschild-International Stevedoring Co., in that the winches at the hatch where the Libelant was working and in operation in connection with the job being done had defective and insufficient equipment, namely, brakes which did slip, and that such slipping of the brakes did proximately cause a sudden lowering of said strong-back and the resulting crushing of the little finger on Libelant's right hand and the finger next to that little finger, and also tendons of the said fingers and the flesh and tissues of the said fingers.

VII

"That the winch brakes in question had been in that unseaworthy insufficient condition for some time, long enough for the Respondent, United States of America, to have discovered it and had time to have remedied it and repaired the said defect, and for a time long enough for the Third Party Respondent, Rothschild-International Stevedoring Co. to have, by reasonable inspection, ascertained and given attention to such unseaworthy and insufficient condition.

VIII

"That the Respondent, United States of America, is liable for the unseaworthiness of the ship caused by such unseaworthy and insufficient equipment in and about the winches and winch brakes; and that the Third Party Respondent, Rothschild-International Stevedoring Co. is guilty of passive negligence in that it failed to exercise due and ordinary care in furnishing the Libelant and those persons working with him a sufficient instrumentality reasonably safe and suitable for doing the work in which Libelant and other employees of the Rothschild-International Stevedoring Co., were engaged at the time the accident occurred; and that such negligence on the part of the Rothschild-International Stevedoring Co. was a proximate cause of the accident and resultant personal injuries sustained by Libelant."

EFFECT OF APPEAL FROM THE DECREE OF AN ADMIRALTY TRIAL JUDGE

In an appeal from a decree entered by the District Court sitting in admiralty the result is a trial in the Appellate Court de novo and the entire case and record therein is opened for review to the same extent as if both of the parties had appealed, upon the theory that an appeal vacates the decree of the Trial Court and that the entire cause is heard de novo in the Appellate Court.

This rule was announced in a recent decision of the Supreme Court of the United States in the case of *"The John Twohy,"* 255 U. S. 77, 79; 41 S. Ct. 251; 65 L. Ed. 511.

See also:

Standard Oil Co. v. So. Pac. Co., 268 U. S. 146, 155; 45 S. Ct. 465; 69 L. Ed. 890.

An appeal in Admiralty vacates the decree entered and removes the cause to the Appellate Court for a trial de novo.

"The Lidia" (CCA2) 1 F(2) 18.

Olsen v. Alaska Packers Ass'n. (CCA9) 114 F(2) 364.

"The Townsend" (CCA2) 29 F(2) 491.

CONCLUSIVENESS OF FINDINGS OF THE TRIAL COURT

Conclusions to be drawn from the evidence in the Admiralty case are primarily for the trial judge where the trial judge saw the witnesses, heard their testimony, observed their demeanor under oath and had an opportunity of passing upon their credibility and accuracy.

With these conclusions the Appellate Court will not interfere unless the record discloses some plain error of fact or unless there is a misapplication of some rule of law.

See:

"The Bergen" (CCA9) 64 F(2) 877.

Wandtke v. Anderson, et al (CCA9) 74 F(2) 381.

"The Andrea F. Luckenbach" (CCA9) 78 F(2) 827.

"The Redwood" (CCA9) 81 F(2) 680.

"The Golden Star" (CCA9) 82 F(2) 687.

"The Heranger" (CCA9) 101 F(2) 953.

"The Catalina" (CCA9) 95 F(2) 283.

In cases where questions of fact must be resolved from sharply conflicting evidence, the decision of the trial judge who had the opportunity of observing the witnesses under oath, judging of their appearance, sincerity and general demeanor will not be reversed unless it clearly appears that

the decision is against the evidence. This rule has been applied in the following Admiralty cases:

Siciliano v. Calif. Sea Products Co. (CCA9) 44 F(2) 784.

"The Catalina" (CCA9) 95 F(2) 283.

"The Mazatlan" (CCA9) 287 F 873.

"The Beaver" (CCA9) 253 F 312.

Sorenson v. Alaska S. S. Co. (CCA9) 247 F(2) 294.

"The Hardy" (CCA9) 229 F 985.

The Appellate Court in Admiralty can not determine the credibility of witnesses heard in the Trial Court, despite its broad appellate powers. This rule was announced in

Crowley Launch & Tugboat Co. v. Wilmington Transportation Co. (CCA9) 117 F(2) 651.

ARGUMENT

I

THE PROXIMATE CAUSE OF THE ACCIDENT WAS THE NEGLIGENCE OF THE OPERATOR OF THE SHIP IN ALLOWING A COMPLICATED AND INTRICATE MECHANISM SUCH AS THE AUTOMATIC BRAKING DEVICE ON THE WINCH TO BECOME AND REMAIN DANGEROUSLY DEFECTIVE, EVEN AFTER RECEIVING COMPLAINTS BY THE STEVEDORES.

The Stevedores complained on several occasions about the condition of the winches. This mechanism is one which could not be repaired by the Stevedores. The braking device on these winches is a very intricate affair, as is evidenced by the description given thereof by Assistant Electrician Palmer which has been quoted hereinabove. Certainly these Stevedores would not have the knowledge, the ability, nor would they even have the right to interfere with or attend to repairing this complicated machinery.

Having made claims and having witnessed that some representative of the ship had responded, the Stevedores had a right to rely on the fact that the Ship and its servants had performed their duty and corrected the defect.

If the defect was one which could not be corrected, naturally the Stevedores would assume that they would be so advised, or at least their foreman, Mr. Petri, would be so advised.

Mr. Rigney, the winch driver, and Mr. Sellman, the hatch tender, testified that complaints had been made. Mr. Rigney stated that he himself had registered a complaint on two different occasions on that very evening. The last complaint was about 20 minutes to 9 or 50 minutes before this accident happened.

On each of these occasions, Mr. Rigney, the winch driver, testified that someone from the Ship responded to his complaint. It was not Mr. Rigney's duty or capacity to investi-

gate or to determine what corrective measures had been taken. The evidence is undisputed that that duty devolved entirely upon the Ship and its employees.

The inference is, and it is one that the Trial Court could reasonably have drawn, having observed the witnesses and heard them testify and having opportunity to test their sincerity, that an examination having been made and the necessary work having been performed on the machinery, the winch driver was told to go ahead with his work. Certainly that inference can be drawn from substantial evidence from witnesses who were under oath and who testified orally before a trial judge.

The hatch tender, Mr. Sellman, testified that some 30 days before this accident, on a prior trip, he had made complaint to the Ship about the winch and asked them to have it repaired and that they had promised that they would do so.

Mr. Sellman further testified that it was his experience that on these Army ships it did very little good to make complaint, that the Ship evidently ignored the complaints of the Stevedores and through their studied and persistent indifference, the Stevedores were forced to do the best they could under the hazardous circumstances, deliberately brought about by the indifference and neglect of the Ship, its officers and employees.

Mr. Sellman explained very clearly the situation with which the Stevedores were faced in working on the Army

ships, to-wit: He stated it did very little good to make complaint and that if the Stevedores quit work every time they were obliged to work with defective equipment, that they would be going home pretty early pretty often (Aps. 113).

In other words, the Stevedores were working with equipment which they had no capacity to repair or maintain. The automatic braking device on the winches has been described by the chief electrician and it is very obvious that it is a contrivance that required a peculiar knowledge and skill to maintain and repair.

To have that situation in itself places this case in a different category than some of the cases which Appellants have referred to as authorities for a reversal.

Furthermore, the Stevedores did all that they could be expected to do under the circumstances. They registered their objection to working with this complicated mechanism on the grounds that it was defective and not performing satisfactorily.

Credible evidence which the Court no doubt based his findings upon was to the effect that at 7:30 p.m. on that evening and again at 8:40 p.m. objections were made by the Stevedores, particularly by the winch driver, Paul Rigney. There is credible evidence which the Court was justified in accepting to the effect that the Ship's employees responded to these calls and did some work on the equipment.

From the above facts, it is only logical that the Stevedores would have a right to rely on the Ship's agents, their work, and their good faith in maintaining the equipment. The Stevedores would then have a right to go ahead and work on, relying on this assumption.

It is very important to remember that the Ship had the "know-how." They had the ability. They had the authority. They had the men to do this work. The Ship had the responsibility after being warned and requested, to perform the work requested in good faith and with care.

This they did not do and their indifferent attitude and their negligent omission of their duty was the activating, proximate, moving cause of this accident.

The testimony of Night Mate Ness and Assistant Electrician Palmer on duty on the night in question is at the best merely negative. Chief Electrician James A. Steele was not even aboard ship on the night of the accident, so of course he can lend no light whatsoever to the situation.

It is important to consider that every word with reference to the actual condition of the braking device on the winch at No. 1 hatch came from oral testimony from witnesses who were sworn and testified in open court and not from depositions.

Therefore, the findings of the trial judge who had these witnesses under his direct surveillance and observation are

entitled to extremely careful consideration and bear great weight.

The evidence fails to indicate that the Ship's personnel responsible for the maintenance of the winches made any check-up on these winches at any time prior to the beginning of work on the night in question. The evidence fails to show that the Ship took any steps to correct the trouble which existed one month before and of which they were advised by Mr. Sellman. These electricians who represent the Ship are skilled artisans. By checking the brake they can tell whether it will perform properly or how long it will function well. The knowledge is within their capacity and not within the capacity of the Stevedores. There is not a word of evidence in the record that the Stevedores have any knowledge or information with reference to the repair or maintenance of the device in question.

II

THE STEVEDORES DID NOT HAVE ANY PRIOR ACTUAL KNOWLEDGE ON THE NIGHT IN QUESTION OF THE PARTICULAR MECHANICAL DEFECT WHICH BROUGHT ABOUT THIS ACCIDENT.

Counsel for the Appellant while cross-examining the hatch tender, Claud Sellman, asked the following questions:

"Q. There wasn't anything wrong with the winches up until Mr. Dillon's accident, was there?

A. Yes.

Q. What was it?

A. The same thing, when you are going to land a load, sometimes it will slip two or three feet before it stops.

Q. How many times did that occur before Mr. Dillon's injury?

A. Maybe half a dozen times, maybe not.

Q. Did it, half a dozen times?

A. When I was over the hatch, I always make a practice to give him the signal to stop quite a ways up.

Q. I am asking you how many times the winches slipped after they were stopped on the evening of Mr. Dillon's injury before his accident occured?

A. After they were stopped? I didn't say anything about them slipping after they were stopped.

Q. What did you say was wrong with them?

A. When you are coming to a stop, sometimes they would drop before the brake caught." (Aps. 111 and 112).

It is extremely important in evaluating the evidence in this case to note that the defect herein described by the Hatch Tender Sellman, was not the defect that brought about the injury to the Libelant. We wish to stress and make clear the point that the defect which Mr. Sellman described is not that the winches or the brake slipped *after they were stopped* (italics ours). What Mr. Sellman made clear was this: "That when you are trying to come to a stop, sometimes they would drop before the brake caught."

That was the condition they had been confronted with and which they had complained about.

This, however, was not what caused the accident. It was a mechanical defect entirely different and one of which they had no prior knowledge, according to the testimony of Mr. Sellman which the Court could believe. The mechanical defect which brought about the accident to the Libelant was a dropping or slipping *after* the brake was released and the winch driver was "coming back" or lowering the load.

Now, it is extremely imperative that this distinction be noted. This situation is not the condition described by Mr. Sellman. Mr. Sellman simply stated that they had been slipping "when you were coming to a stop," before the brake caught. He didn't say anything about them slipping after they were stopped.

But it is this latter which happened and this is the defect which brought about the accident and the Stevedores certainly had no knowledge of that situation. These distinctions all go to prove and demonstrate conclusively the intricacy of this mechanism and the imperativeness of greater care and more methodical scrutiny of the equipment on the part of the Ship, which they failed to exercise.

Responsibility accompanies Knowledge and Authority. The Ship had Knowledge and Authority. They did not use it. The Stevedore had neither. He did the best with the service

he was given, which it must be conceded was most indifferent and negligent.

There is no question but what the United States as the owner owed a non-delegable duty to furnish Dillon, the Stevedore, with a seaworthy ship and a safe place in which to work. This is acknowledged by Appellants in their brief.

See:

Seas Shipping v. Sieracki (1946) 328 U. S. 85.

This duty the Ship flagrantly breached under credible evidence which the trial judge could and did accept and upon which he based the findings that the Ship was unseaworthy and that injuries were brought about because of unseaworthiness of the Ship which condition had existed for a sufficient time for the United States of America, operator of the Ship to have discovered it and to have had time to remedy it and to have repaired said defect.

The court further found that the negligence of the Respondent Stevedore was merely passive.

The court further found and the finding was based on credible oral testimony by witnesses who were personally in court, that the Ship is liable for the unseaworthy and inefficient equipment in and about the winches and the winch brakes.

III

ANSWER TO THE ARGUMENT OF THE APPELLANT

Heretofore in our main argument we have answered part I of the Appellant's argument with reference to proximate cause and we will not repeat the same at this time.

The Appellants admit under Section II of their argument that the United States as a ship owner has an undelegable duty to furnish the Stevedore with a seaworthy ship and a safe place in which to work. This duty they can not avoid, neither can they disclaim this obligation and delegate it to someone else and thereby relieve themselves of responsibility. It is the Respondent's position that this duty was violated *knowingly*.

In answer to part III of the Appellant's argument with reference to the Respondent's contractual duty, suffice to say that under the evidence, which the Trial Court could accept, this Respondent was performing its contract to stevedore the vessel properly. There was nothing improper in the manner in which it was performing the work. This accident did not result either proximately or remotely because of any lack of professional skill on the part of the Stevedore.

THIS ACCIDENT WAS PROXIMATELY CAUSED BY THE HEEDLESS AND NEGLIGENT FAILURE OF THE APPELLANT TO MAINTAIN THEIR GEAR IN A

SEAWORTHY CONDITION, GEAR WHICH WAS A HIGHLY INTRICATE MECHANISM, THE DEFECTS IN WHICH COULD NOT BE CORRECTED BY THE STEVEDORE.

The Appellants cite certain cases illustrating the rule with reference to the duty of the Stevedore to inspect the Ship's appliances with reference to their safety.

These cases of course discuss and deal with situations not at all apropos to the situation here. The cases cited refer to unsafe mode of access to the ship by Jacob's ladder which was defective. Now, it is obvious without discussion that a defective Jacob's ladder comes within the category of a simple tool or simple appliance and if it is defectively or improperly fastened, that is something which can be readily observed by those about to use it. It is not a complicated gear which requires a skilled person to properly secure. There is no similarity between the type of gear referred to in those cases cited and the case at bar. Therefore, of course, it follows logically that the care required bears a direct relation to the obscurity and intricateness of the mechanism involved. The Stevedore could not exercise care with reference to a matter which was intricate, obscure and unknown to him.

Whereas, an ordinary "land lubber" who had never been on a ship could readily observe whether or not a Jacob's

ladder was properly secured to the side of the ship before he used the same. The cases are not in point.

We have already discussed Section IV of the Appellants' argument. It touches upon the question of proximate cause and we feel that repetition would add nothing to this discussion.

IV

THE ARROW CASE IS NOT IN POINT

The Appellant very cursorily refers to and discusses the Arrow case.

We feel this case should be carefully discussed and the factual background thereof fully referred to because the case when discussed in the light of its own particular facts is not at all in point.

In that case the government appealed from a decree in Admiralty denying a recovery from Arrow, who were impleaded by the government, in a proceeding brought against them by one Percy Williams, a stevedore employee of Arrow.

The government sued Arrow on their contract to indemnify the Government against loss suffered by them from Arrow's performance of its contract to unload cargo. In that case Williams' injury arose from the negligent use of a defective hatch cover which fell on him, so at the outset we see that the defect was in gear of a very different nature

than that in the case at bar and it will be observed that the defect was one which could plainly be seen by everyone concerned, *and it could have been remedied by the Stevedore.* The Government admitted liability to the Stevedore because of its continuing duty to him. The Government claimed that the conscious use of the Stevedore of the defective hatch cover was a proximate cause of the accident and this action was brought by the Government against the Stevedore for recovery of the damages paid by the Government because of the injuries sustained by Williams.

In that case the evidence showed that Williams was hurt some time after 7 a.m. on May 28, 1945 when the cover of the No. 4 port hatch on the lower deck fell upon him. The Appellate Court agreed with the District Court's findings that both dogs were defective and the pins were absent and the hatch cover could not be held erect and that it fell because it was insecurely held by defective dogs.

The Appellate Court however stated that the District Court was in error when it found that *none of the defects* in the dogs were known to Arrow and that the District Court was in error in holding that Arrow's conduct was not a proximate cause of the accident.

Arrow's stevedore supervisor, Mr. Bowers, testified that on the night before he was supervising the night shift's unloading of the starboard and port No. 4 hatch.

The port hatch was raised and secured by the Stevedores at 2 a.m. on the morning of the accident. The defect in the dogs was then discovered and work was discontinued at that hatch. The supervisor said he knew the condition of the hatch and didn't consider it safe. One pin was bent and they couldn't get the other pin in. There was no pin in the aft dog.

With the port hatch in this dangerous shape, the Stevedores worked the safe starboard hatch until 6 a.m. when their shift ended. The morning shift began at 7 a.m. and Bowers testified he did not warn anyone on the morning shift of the dangerous condition of the hatch. At 7 a.m. Larsen, Arrow's boss of No. 4 hatch, looked down from the top deck and stated all seemed safe to him.

The foreman and six men were sent to the port hatch to work. The hatch cover fell and Williams was hurt.

Bowers testified that on the afternoon before the accident he asked the lieutenant of the ship to rig a boom and lift the hatch on the port side.

The officer said he would have the cover properly rigged some time during the day. That is, some time during the day shift.

It is obvious that these facts illustrate a decidedly different situation and an accompanying responsibility of the supervisor of the Stevedores not present in the case at bar.

The Appellate Court could rightly observe that it was apparent that Arrow's supervisor knew the Ship would do nothing about the cover of the port hatch until some time during the day shift.

In other words Bowers, the supervisor for the stevedoring company, was fully aware of a very apparent and obvious danger. He himself testified that during the afternoon he requested the lieutenant of the Ship to remedy this situation.

The officer of the Ship, however, definitely and immediately put the Stevedore's supervisor on notice that they wouldn't or couldn't fix it until some time during the day shift.

With that understanding the Stevedore's supervisor went ahead well knowing that this dangerous situation was threatening the safety and lives of the men, fully realizing that the morning shift was coming on duty at 7 a.m. There was no testimony that Bowers advised the morning shift or their foreman about this situation.

Furthermore, the boss of the morning gang testified that he looked down into the hatch and all seemed safe to him. In other words, Bowers was not only negligent in failing to report the condition to the boss of the morning shift, but the latter himself after looking and inspecting the situation, thought it looked alright and safe enough to proceed. It was a situation which was obvious and open to view. One of the supervisors of the Stevedore had been definitely told by the

Ship that it would not be remedied until the day shift. Yet he never communicated this information to anyone. The Ship had definitely made a promise to take care of this defect on the day shift. Therefore, they had no more obligation than to do what they had promised.

There are no facts similar to this situation in the case at bar. In other words, in the Arrow case, the Ship and the Stevedore made a new agreement, to-wit: The Ship acknowledged that the defective condition was there, but promised to take care of it during the day shift. There is nothing akin to this situation in the case at bar.

Another distinguishing feature which conclusively destroys the Arrow case as an authority in the case at bar is the fact that under the uncontradicted testimony, the defective condition of the dogs on the port hatch could have been securely held erect by a clamp and turnbuckle attached to both starboard and port hatch doors.

The testimony showed that such turnbuckle and gear was right there by the hatch, available for that purpose.

The testimony showed that the door was safely secured by clamp and turnbuckle after the accident.

In other words, this was a simple situation which could have been handled by the Stevedores themselves. It could have been remedied by them. It was open and obvious and there to see. Yet with knowledge of the situation and the

dangers therein and with knowledge of *how* to remedy the situation, the Stevedore's foreman ordered his men to go forward with the work.

In the case at bar, when the defects in the winch brakes were detected, complaint was made. The Ship responded and did something to the winch. The Stevedore had a right to assume that they were fixed.

In the case at bar the evidence does not show that any agreement was made with the Ship to work with dangerous gear until some later time when it would be fixed, *as in the Arrow Case.*

The evidence does not show in the case at bar that the defect was one which could have been readily remedied, *as in the Arrow case.*

The evidence in the case at bar does not indicate that Mr. Petri, the supervisor or walking boss of the Stevedore, had any knowledge whatsoever of any dangerous condition and that so knowing failed to communicate it to his men, *as in the Arrow case.*

The trial judge quickly and accurately distinguished the Arrow case from the case at bar when the argument was had at the close of the evidence. The distinctions seem numerous and clearly render the Arrow case uncontrolling as an authority herein.

Under Section VI of their argument, the Appellants discuss their right to indemnity. They cite the case of *Rich v. U. S.* (CCA2) 177 F(2) 688. This case of course is not apt on the facts. It involves the alleged negligence of the employee in fastening a ladder. Again it is a situation where the gear is simple. The danger if any is open and apparent. We have discussed these distinctions quite fully hereinabove and we do not wish to repeat. The Appellant argues that the Stevedore had the last clear chance to avoid the injury. The answer to that is very simple, the last clear chance is in the possession of the one who has the knowledge, the control, the authority, and the ability to correct the dangerous situation which caused the injury, *that was the Ship.*

The cases cited by the Appellant in support of this rule on pages 19 and 20 are for the most part old cases and deal with facts entirely dissimilar from those at bar and with rules altogether different. They are not cases in Admiralty jurisdiction and they are not authority for the rule for which the Appellant intends it. These cases deal with elevators, streetcars, automobile accidents, train crossing accidents and situations which throw no light and give no assistance whatsoever to this Court in considering the case at bar.

CONCLUSION

It is submitted that the findings of the trial judge and the conclusions he drew therefrom were based on credible and substantial evidence.

All witnesses who testified as to the *actual condition* of the winch and the brakes testified orally under oath in the presence of the judge. He had the opportunity to observe them, to weigh their credibility, to study their demeanor and their sincerity. Under these circumstances and under the law heretofore stated, his Findings and his Judgment are entitled to great weight and we submit that the Judgment of the Trial Court should be affirmed.

Respectfully submitted,

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Proctor for Appellant